

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **DISTRICT OF NEVADA**

3 BRENT MORRIS,

4           Plaintiff

5 v.

6 C. KERNER, et. al.,

7           Defendants  
8

Case No.: 3:17-cv-00073-RCJ-WGC

**Report & Recommendation of  
United States Magistrate Judge**

Re: ECF No. 40

9           This Report and Recommendation is made to the Honorable Robert C. Jones, United  
10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28  
11 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12           Before the court is Defendants' Motion for Summary Judgment. (ECF Nos. 40, 40-1 to  
13 40-15, errata at ECF Nos. 42, 42-1 to 42-17<sup>1</sup>.) Despite being given an extension of time, Plaintiff  
14 did not file a response.

15           After a thorough review, it is recommended that Defendants' motion be granted.

16                                   **I. BACKGROUND**

17           When Plaintiff filed this action, he was an inmate in the custody of the Nevada  
18 Department of Corrections (NDOC), proceeding pro se with this action pursuant to 42 U.S.C.  
19 § 1983. (Compl., ECF No. 1-1.) Plaintiff's original and first amended complaints were dismissed  
20 with leave to amend. (ECF Nos. 1-1, 3, 6, 12.)  
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<sup>1</sup> The errata contains the entire set of bates stamped exhibits with an appendix.

1 After filing the first amended complaint, Plaintiff filed a notice of change of address  
2 indicating a new address in Michigan. (ECF No. 7.) He was apparently subsequently incarcerated  
3 in the Cooper Street Correctional Facility in Michigan. (ECF No. 9.)

4 Plaintiff then filed a second amended complaint (SAC) (ECF No. 13), which is the  
5 operative complaint. On screening the SAC, the court allowed Plaintiff to proceed with claims  
6 for denial of access to the courts against Julie Matousek (mistakenly named by Plaintiff as  
7 Matonsek), Curtis Kerner, and Thomas Hinckle. (ECF No. 14.)

8 Plaintiff alleges that on February 3, 2015, he went to the Ely State Prison (ESP) property  
9 room to pack up his personal property because he was being transferred to Northern Nevada  
10 Correctional Center (NNCC) for medical treatment. Matousek told Plaintiff there was not room  
11 in his duffle bag for all of his legal documents, and that he would need four fire-retardant boxes  
12 for the remaining legal files and documents. Plaintiff told Matousek he only had two fire-  
13 retardant boxes. Matousek filled two fire-retardant boxes with legal documents and placed the  
14 remaining legal documents into two regular boxes, advising Plaintiff that only the two fire-  
15 retardant boxes would be allowed on the transportation bus, and the two regular boxes would be  
16 stored in the property room at ESP. Matousek told Plaintiff he could pay to have the other two  
17 boxes shipped to him at NNCC.

18 Plaintiff told Sergeant Kerner he should not have to pay to ship the two boxes of legal  
19 documents, but Kerner maintained Plaintiff could not have them shipped with him on the  
20 transportation bus. He told Plaintiff he had 90 days to forward the two boxes to Plaintiff at  
21 NNCC, but the legal documents were never sent to him.

22 Plaintiff also avers that while in the property room at ESP, Hinckle approached him with  
23 mail contained in a small box, which contained legal papers from his federal habeas case.

1 Plaintiff asked Hinckle to place the box in his duffle bag so it could be transported with him to  
2 NNCC, but Hinckle refused. Instead, Hinckle put the box in one of the regular boxes that  
3 Matousek would not allow to be transported with Plaintiff.

4 Plaintiff alleges that the files were related to his habeas proceeding, and claims he could  
5 not challenge his convictions without those legal documents, which included the trial and  
6 evidentiary hearing transcripts, previously filed briefs and his research notes.

7 Plaintiff subsequently filed another notice of change of address to the Central Michigan  
8 Correctional Facility. (ECF No. 20.) On September 29, 2020, Plaintiff filed another notice of  
9 change of address listing his new address in Detroit, Michigan. (ECF No. 39.)

10 On December 11, 2020, Defendants filed their motion for summary judgment, and  
11 subsequently their errata with the corrected exhibits, which were served on Plaintiff at his most  
12 recent address of record. (ECF No. 40 at 19; ECF No. 42 at 3.) Defendants argue: (1) the official  
13 capacity claims for money damages should be dismissed; (2) they are entitled to summary  
14 judgment on the access to courts claim because it was Plaintiff's own conduct that resulted in his  
15 not having access to the files, and in any event, Plaintiff did not suffer actual injury; and (3) they  
16 are entitled to qualified immunity.

## 17 **II. LEGAL STANDARD**

18 The legal standard governing this motion is well settled: a party is entitled to summary  
19 judgment when “the movant shows that there is no genuine issue as to any material fact and the  
20 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp.*  
21 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if the  
22 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*  
23 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is “material” if it could affect the outcome

1 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary  
2 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the  
3 other hand, where reasonable minds could differ on the material facts at issue, summary  
4 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

5 “The purpose of summary judgment is to avoid unnecessary trials when there is no  
6 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18  
7 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose  
8 of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477  
9 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that  
10 one party must prevail as a matter of law”). In considering a motion for summary judgment, all  
11 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*  
12 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*  
13 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the  
14 nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*,  
15 477 U.S. at 249-250 (citations omitted). The court’s function is not to weigh the evidence and  
16 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;  
17 *Anderson*, 477 U.S. at 249.

18 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.  
19 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must  
20 come forward with evidence which would entitle it to a directed verdict if the evidence went  
21 uncontroverted at trial.’... In such a case, the moving party has the initial burden of establishing  
22 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*  
23 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations

1 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or  
2 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate  
3 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving  
4 party cannot establish an element essential to that party's case on which that party will have the  
5 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

6 If the moving party satisfies its initial burden, the burden shifts to the opposing party to  
7 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*  
8 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine  
9 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute  
10 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."  
11 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)  
12 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment  
13 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475  
14 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the  
15 pleadings and set forth specific facts by producing competent evidence that shows a genuine  
16 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

### 17 III. DISCUSSION

18 Inmates have a constitutional right of access to the courts. *See Bounds v. Smith*, 430 U.S.  
19 817, 828 (1977), *limited in part on other grounds in Lewis v. Casey*, 518 U.S. 343, 354 (1996).  
20 An inmate alleging a violation of their right of access to the courts must show "actual injury," a  
21 requirement that "derives ultimately from the doctrine of standing, a constitutional principle that  
22 prevents courts of law from undertaking tasks assigned to the political branches." *Lewis v.*  
23 *Casey*, 518 U.S. 343, 349 (1996) (citations omitted). The right of access to the courts does not

1 guarantee an inmate the right to “*litigate effectively* once in court.” *Id.* at 354 (emphasis original).  
2 Nor does it “guarantee inmates the wherewithal to transform themselves into litigating  
3 engines[.]” *Id.* at 355.

4       Where a prisoner asserts a backward-looking denial of access to courts claim—one  
5 seeking a remedy for a lost opportunity to present a legal claim—he or she must show the loss of  
6 a "nonfrivolous" or "arguable" underlying claim[.]” *Christopher v. Harbury*, 536 U.S. 403, 415  
7 (2002). The right of access to the courts is limited to non-frivolous direct criminal appeals,  
8 habeas corpus proceedings, and section 1983 actions. *See Lewis*, 518 U.S. at 353 n. 3, 354-55;  
9 *Simmons v. Sac. Cnty. Sup. Ct.*, 318 F.3d 1156, 1159-60 (9th Cir. 2003). The right is only a right  
10 to bring complaints to court, and not a right to discover such claims or litigate them effectively  
11 once filed with a court. *See Lewis*, 518 U.S. at 354-55.

12       Defendants present evidence that Plaintiff could have paid to have the excess documents  
13 shipped out to him, by using a “brass slip,” in which case he would not have been required to pay  
14 the cost of shipping up front. (ECF No. 40 at 7; ECF No. 42-6.) Regardless of whether Plaintiff  
15 could have had the documents shipped to himself, or it was Defendants’ conduct that caused him  
16 to be deprived of his legal documents (as Plaintiff alleges), Defendants have submitted unrefuted  
17 evidence that Plaintiff did not suffer actual injury with respect to his federal habeas petition. This  
18 is fatal to his access to courts claim.

19       Plaintiff was convicted of two counts of commission of a fraudulent act in a gaming  
20 establishment, a felony, and four counts of entry into a gaming establishment by an excluded  
21 person, a gross misdemeanor. (ECF No. 14-10 in Case 3:14-cv-00372-LRH-WGC.) For the  
22 felony conviction, he was adjudicated a habitual criminal and sentenced to two concurrent terms  
23 of 8-20 years' incarceration, which were to run concurrently with his sentences on the gross

1 misdemeanors on July 7, 2011. (*Id.*) Plaintiff appealed his conviction (ECF No. 14-2 in 3:14-cv-  
2 00372-LRH-WGC), and the Nevada Supreme Court affirmed the conviction. (ECF No. 15-9 in  
3 3:14-cv-00372-LRH-WGC.) Plaintiff then filed his first State petition for writ of habeas corpus  
4 on September 13, 2012, seeking post-conviction relief. (ECF No. 15-12 in 3:14-cv-00372-LRH-  
5 WGC.) Following a counseled supplement and an evidentiary hearing, the State petition was  
6 denied. (ECF Nos. 15-19, 15-24, 16-7, 16-8 in 3:14-cv-00372-LRH-WGC.) He filed a post-  
7 conviction appeal raising six claims of ineffective assistance of counsel. (ECF No. 16-12 in 3:14-  
8 cv-00372-LRH-WGC.) The Nevada Supreme Court affirmed the denial of relief, and the  
9 remittitur issued on July 6, 2015.

10 On August 4, 2015, Plaintiff moved to modify his sentence regarding the habitual  
11 criminal aspect of the sentence. (ECF No. 60-1 in 3:14-cv-00372-LRH-WGC.) The motion was  
12 denied, and Plaintiff appealed. (ECF Nos. 60-5, 60-9, 60-14 in 3:14-cv-00372-LRH-WGC.) The  
13 Nevada Supreme Court affirmed the denial. (ECF No. 60-16 in 3:14-cv-00372-LRH-WGC.)

14 In July of 2014, Plaintiff initiated his federal habeas action, in case 3:14-cv-00372-LRH-  
15 WGC, with his original petition raising one claim concerning the sufficiency of the evidence.  
16 (ECF No. 2 in 3:14-cv-00372-LRH-WGC.) The respondents filed their answer and  
17 accompanying exhibits on January 29, 2015. (ECF Nos. 11, 12-1 to 12-24, 13-1 to 13-24, 14-1 to  
18 14-24, 15-1 to 15-24, 16-1 to 16-25 in 3:14-cv-00372-LRH-WGC.) On February 4, 2015, Judge  
19 Hicks ordered Plaintiff to file his reply to the answer within 45 days. (ECF No. 17 in 3:14-cv-  
20 00372-LRH-WGC.)

21 On March 5, 2015, and May 4, 2015, Plaintiff requested extensions of time to file his  
22 reply brief, asserting that he was transferred from ESP to NNCC on February 5, 2015, and was  
23 not allowed to have two of his boxes of legal paperwork transferred with him that related to his

1 federal habeas case. He contended that he did not have the underlying documentation he needed  
2 to file his reply, including the transcripts from the trial and evidentiary hearing in his criminal  
3 case. (ECF Nos. 19, 20, 20-1 in 3:14-cv-00372-LRH-WGC.) Judge Hicks granted both requests.  
4 (ECF Nos. 21, 22 in 3:14-cv-00372-LRH-WGC.)

5 On July 13, 2015, Plaintiff an amended federal habeas petition raising 11 grounds for  
6 relief. (ECF No. 25 in 3:14-cv-00372-LRH-WGC.) Plaintiff subsequently filed five more  
7 requests for an extension of time to file a reply to the respondents' answer to the original federal  
8 habeas petition. (ECF Nos. 26, 31, 32, 33, 35 in 3:14-cv-00372-LRH-WGC.) The respondents  
9 filed an opposition to one of the requests for an extension, stating that Plaintiff should have  
10 asked for a copy of the answer and exhibits (which contained the relevant documentation  
11 Plaintiff sought to file his reply) from respondents or the court instead of waiting over a year.  
12 Nevertheless, the respondents agreed to mail a copy of the answer and the exhibits to Plaintiff,  
13 and agreed to a short extension of time for Plaintiff to file his reply. (ECF No. 34 in 3:14-cv-  
14 00372-LRH-WGC.)

15 Judge Hicks denied the pending requests for extension of time as moot, noting that  
16 Plaintiff had, at that point, received the exhibits to respondents' answer to the original petition,  
17 which contained the court record which Plaintiff had claimed was taken from him when he  
18 transferred from ESP to NNCC. Judge Hicks also required the respondents to file a response to  
19 Plaintiff's amended federal habeas petition. (ECF No. 36 in 3:14-cv-00372-LRH-WGC.)

20 The respondents subsequently filed a motion to dismiss the amended petition.  
21 (ECF No. 37 in 3:14-cv-00372-LRH-WGC.) Plaintiff filed a response to the motion to dismiss  
22 on April 29, 2016. (ECF No. 38 in 3:14-cv-00372-LRH-WGC.) The response contains detailed  
23 quotations from Plaintiff's trial and evidentiary hearing in his criminal case.



1 Judge Hicks granted the respondents' motion to dismiss the amended petition in part and  
2 denied it in part, finding that Plaintiff had not presented his claims raised in the federal amended  
3 habeas petition to the State court to exhaust them. (ECF No. 42 in 3:14-cv-00372-LRH-WGC.)  
4 Plaintiff sought, and Judge Hicks granted, a stay and abeyance of his amended petition to return  
5 to state court to exhaust his claims. (ECF Nos. 51, 61 in 3:14-cv-00372-LRH-WGC.)

6 In May of 2018, Plaintiff filed a second State habeas petition to exhaust his federal  
7 claims. The State court ruled the second petition was time-barred. (ECF No. 77-4, 77-5, 77-6 in  
8 3:14-cv-00372-LRH-WGC.) Plaintiff appealed, and the Nevada Supreme Court affirmed the  
9 dismissal of the second state petition as untimely. (ECF Nos. 77-1, 77-2 in 3:14-cv-00372-LRH-  
10 WGC.)

11 The next month, Judge Hicks reopened the federal habeas case on Plaintiff's request.  
12 (ECF No. 69 in 3:14-cv-00372-LRH-WGC.) The respondents filed an amended motion to  
13 dismiss. (ECF No. 73 in 3:14-cv-00372-LRH-WGC.) On August 13, 2020, Judge Hicks  
14 dismissed grounds 2-7 and 9 of the amended petition with prejudice as procedurally defaulted,  
15 and dismissed ground 8 with prejudice to the extent it argued that the state court erred by using  
16 Plaintiff's prior convictions in adjudicating him as a habitual criminal, and failing to make a  
17 finding the habitual criminal status was just and proper. (ECF No. 81 in 3:14-cv-00372-LRH-  
18 WGC.) The respondents then filed a second motion to dismiss. (ECF No. 90 in 3:14-cv-00372-  
19 LRH-WGC.) Despite being given an extension of time, Plaintiff failed to file a response to the  
20 second motion to dismiss, and Judge Hicks dismissed the remainder of the action without  
21 prejudice. (ECF Nos. 93, 95 in 3:14-cv-00372-LRH-WGC.)

22 Defendants acknowledge that on February 3, 2015, Plaintiff went to ESP's property room  
23 to pack his property in preparation for his transfer from ESP to NNCC. He had two boxes worth

1 of legal work that under NDOC regulations could not be included on the transportation bus.  
2 (ECF No. 42-3.) Plaintiff was given the option of having the legal work shipped or mailed at his  
3 own expense, having it destroyed by the property officer, having it donated to charity or to  
4 appeal the decision through the inmate grievance process. Plaintiff elected to appeal the decision  
5 through the inmate grievance process. (*Id.*; ECF No. 42-6.)

6 The docket in Plaintiff's federal habeas action, on which his access to courts claim is  
7 predicated, reveals that Plaintiff did not suffer actual injury. When he filed motions for  
8 extensions of time to file his reply to the answer to his original habeas petition because he did not  
9 have the underlying record, the extensions were granted, and then deemed moot when the  
10 respondents provided him with the underlying record and the court directed them to file a  
11 response to the amended habeas petition. The respondents filed a motion to dismiss the amended  
12 petition, to which Plaintiff filed a response that including direct detailed quotations from his trial  
13 and evidentiary hearings as well as other orders, directly contradicting his allegations of actual  
14 injury in this case. Therefore, Defendants' motion for summary judgment should be granted, and  
15 the court need not reach their remaining arguments.

#### 16 **IV. RECOMMENDATION**

17 IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**  
18 Defendants' motion for summary judgment (ECF No. 40).


19 The parties should be aware of the following:

20 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
21 this Report and Recommendation within fourteen days of being served with a copy of the Report  
22 and Recommendation. These objections should be titled "Objections to Magistrate Judge's  
23

1 Report and Recommendation” and should be accompanied by points and authorities for  
2 consideration by the district judge.

3 2. That this Report and Recommendation is not an appealable order and that any notice of  
4 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
5 until entry of judgment by the district court.

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7 Dated: April 29, 2021

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William G. Cobb  
United States Magistrate Judge